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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

RANDALL RAYMOND PALMER,

Defendant and Appellant.

H045930

(Santa Clara County
Super. Ct. No. C1509352)

I. INTRODUCTION

Defendant Randall Raymond Palmer appeals after he pleaded no contest to two counts of committing a lewd or lascivious act on a child under the age of 14 by the use of force, violence, duress, menace, or fear (Pen. Code, § 288, subd. (b)).¹ The trial court sentenced defendant to 18 years in prison and ordered him to pay \$10,000 in direct victim restitution, \$2,000 of which was for the victim’s relocation expenses.

Defendant contends that the trial court’s restitution order was “in excess of its statutory authority” because the victim’s relocation expenses were not verified by law enforcement or a mental health provider, as required by section 1202.4, subdivision (f)(3)(I). Alternatively, defendant contends that his counsel was ineffective for failing to object to the restitution imposed for relocation expenses. For reasons that we will explain, we will affirm the judgment.

¹ All further statutory references are to the Penal Code.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. *Factual Background*²

Seven-year-old Jane Doe reported that on multiple occasions, defendant, her 60-year-old step-grandfather, had orally copulated her and put his hands on her vagina. Afterwards, defendant would give Doe candy.

The incidents took place in defendant's bedroom and occurred when defendant was living in Doe's family home. Doe reported the incident after defendant moved out.

B. *Charges, Convictions, and Sentence*

Defendant was charged with two counts of oral copulation or sexual penetration with a child 10 years of age or younger (§ 288.7, subd. (b); counts 1 & 2) and three counts of committing a lewd or lascivious act on a child under the age of 14 (§ 288, subd. (a); counts 3-5). The district attorney later amended the information to add two counts of committing a lewd or lascivious act on a child under the age of 14 by the use of force, violence, duress, menace, or fear (§ 288, subd. (b); counts 6 & 7).

Defendant pleaded no contest to counts 6 and 7. The trial court sentenced defendant to 18 years in prison pursuant to the terms of the plea agreement.

III. DISCUSSION

Defendant contends that the trial court acted "in excess of its statutory authority" when it ordered him to pay restitution for Doe's relocation expenses because the expenses were not verified by law enforcement or a mental health provider, as required by section 1202.4, subdivision (f)(3)(I). Alternatively, defendant contends that he received constitutionally deficient assistance of counsel based on his counsel's failure to object to the restitution order. The Attorney General concedes that " 'verification by law enforcement' of the trial court's award of relocation restitution . . . appears to be absent from the . . . record," but argues that defendant's claim has been forfeited; the trial court

² The facts are taken from the probation officer's report.

did not abuse its discretion when it ordered restitution for relocation expenses because Doe's need to relocate is apparent from the record; and defendant has not demonstrated that his counsel's representation was prejudicially deficient.

A. Trial Court Proceedings

As part of the negotiated plea agreement, defendant indicated his "understand[ing] [that] the Court will order [him] to pay full restitution to any victim(s) for his/her/their losses."

In a supplemental memorandum filed on the date of sentencing, the probation department stated that "[r]estitution included but not limited to \$10,000.00 is requested on the [Doe's] family's behalf for the following: \$2,000.00 for tutoring for Jane Doe for over four years; \$3,200.00 for missed work & mileage driving from Hollister for Court in Santa Clara County; \$2,000.00 in moving costs after the family moved as they did not want to be in the same home where the abuse occurred; \$1,800.00 in therapy for Jane Doe; and \$1,000.00 for Jane Doe's pain and suffering."

At sentencing, after hearing the victim impact statements, the trial court inquired whether anyone "wish[ed] to add anything." Defense counsel stated, "There is a restitution issue we'll submit to the Court."

The trial court imposed "a general order of restitution as well as a specific order of restitution of \$10,000 to [Doe's] family." Defendant did not object.

B. Analysis

1. Forfeiture

The Attorney General contends that defendant has forfeited his claim because he failed to object to the trial court's restitution order. Defendant argues that his claim has not been forfeited because he does not assert a procedural or factual defect, but instead contends that the court acted "in excess of its statutory authority" by ordering restitution for relocation expenses without the requisite verification, which "presents a purely legal issue that is not subject to the waiver rule on appeal."

“[T]he ‘unauthorized sentence’ concept constitutes a narrow exception to the general requirement that only those claims properly raised and preserved by the parties are reviewable on appeal.” (*People v. Scott* (1994) 9 Cal.4th 331, 354.) “[A] sentence is generally ‘unauthorized’ where it could not lawfully be imposed *under any circumstance* in the particular case. Appellate courts are willing to intervene in the first instance because such error is ‘clear and correctable’ independent of any factual issues presented by the record at sentencing. [Citation.]” (*Ibid.*, italics added.) “In essence, claims deemed waived on appeal involve sentences which, though otherwise permitted by law, were imposed in a procedurally or factually flawed manner.” (*Ibid.*) Generally, a defendant “cannot obtain appellate relief concerning [a] restitution order [where] he failed to object to it in the trial court.” (*People v. Le* (1995) 39 Cal.App.4th 1518, 1523.)

Defendant contends that the trial court’s restitution order was improper because the victim’s relocation expenses were not “verified by law enforcement to be necessary for the personal safety of the victim or by a mental health treatment provider to be necessary for the emotional well-being of the victim.” (§ 1202.4, subd. (f)(3)(I).) Defendant’s claim asserts a procedural or factual flaw—imposition of a restitution order for Doe’s relocation expenses without verification of the expenses by law enforcement or a mental health provider. Had the victim’s relocation expenses been verified, the restitution order would have been proper. Thus, the unauthorized sentence exception to the forfeiture rule does not apply because the restitution could have been imposed here with the appropriate verification. Accordingly, defendant forfeited his challenge to the restitution order by failing to object at the sentencing hearing.

2. Ineffective Assistance of Counsel

Defendant contends in the alternative that his counsel was constitutionally deficient for failing to object to the imposition of restitution for Doe’s relocation expenses.

“Under both the Sixth Amendment to the United States Constitution and article I, section 15, of the California Constitution, a criminal defendant has the right to the assistance of counsel.” (*People v. Ledesma* (1987) 43 Cal.3d 171, 215.) To prevail on a claim of ineffective assistance of counsel, a criminal defendant must establish both that his counsel’s performance was deficient and that he suffered prejudice. (*Strickland v. Washington* (1984) 466 U.S. 668, 687 (*Strickland*).) The deficient performance component of an ineffective assistance of counsel claim requires a showing that “counsel’s representation fell below an objective standard of reasonableness” under prevailing professional norms. (*Id.* at p. 688.) Regarding prejudice, a “defendant must show that there is a reasonable probability”—meaning “a probability sufficient to undermine confidence in the outcome”—“that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” (*Id.* at p. 694.) Prejudice requires a showing of “a ‘demonstrable reality,’ not simply speculation.” (*People v. Fairbank* (1997) 16 Cal.4th 1223, 1241.)

Here, defendant has not met either of his burdens. First, defendant has not demonstrated that his counsel was incompetent for failing to object. Ineffective assistance of counsel is particularly difficult to demonstrate on direct appeal because “[t]he appellate record . . . rarely shows that the failure to object was the result of counsel’s incompetence; generally, such claims are more appropriately litigated on habeas corpus, which allows for an evidentiary hearing where the reasons for defense counsel’s actions or omissions can be explored.” (*People v. Lopez* (2008) 42 Cal.4th 960, 966 (*Lopez*).) We cannot determine from this record whether defense counsel decided not to object to the imposition of relocation restitution because he knew that the relocation expenses were verifiable. “ ‘Unless a defendant establishes the contrary, we shall presume that “counsel’s performance fell within the wide range of professional competence.” ’ ” (*Ibid.*) “ ‘If the record “sheds no light on why counsel acted or failed to act in the manner challenged,” an appellate claim of ineffective assistance of counsel

must be rejected “ . . . unless there simply could be no satisfactory explanation.” ’ ’ ”
(*Ibid.*)

Moreover, defense counsel could have reasonably decided that an objection would have been futile based on Doe’s broad right to restitution under the California Constitution, which provides, “It is the unequivocal intention of the People of the State of California that all persons who suffer losses as a result of criminal activity shall have the right to seek and secure restitution from the persons convicted of the crimes causing the losses they suffer.” (Art. I, § 28, subd. (b); see also *People v. Broussard* (1993) 5 Cal.4th 1067, 1073-1074 (*Broussard*) [victim restitution is mandated by the California Constitution].) The Legislature enacted section 1202.4 to implement that constitutional mandate.³ (*Broussard, supra*, at p. 1073.) “[W]hen a defendant is convicted of a crime involving a victim who ‘has suffered economic loss as a result of defendant’s conduct’ (Pen. Code, § 1202.4, subd. (f)), the court must require the defendant to pay full restitution directly to the victim or victims of the crime ‘unless it finds compelling and extraordinary reasons for not doing so, and states those reasons on the record.’ (*Id.*, subd. (g).)” (*People v. Giordano* (2007) 42 Cal.4th 644, 651-652.)

³ As relevant here, section 1202.4 states: “(a)(1) It is the intent of the Legislature that a victim of crime who incurs an economic loss as a result of the commission of a crime shall receive restitution directly from a defendant convicted of that crime. [¶] . . . [¶] (f) [I]n every case in which a victim has suffered economic loss as a result of the defendant’s conduct, the court shall require that the defendant make restitution to the victim or victims in an amount established by court order, based on the amount of loss claimed by the victim. . . . [¶] . . . [¶] (3) [¶] . . . [¶] (I) Expenses incurred by an adult victim in relocating away from the defendant, including, but not limited to, deposits for utilities and telephone service, deposits for rental housing, temporary lodging and food expenses, clothing, and personal items. Expenses incurred pursuant to this section shall be verified by law enforcement to be necessary for the personal safety of the victim or by a mental health treatment provider to be necessary for the emotional well-being of the victim.”

In *People v. Mearns* (2002) 97 Cal.App.4th 493, 496, the trial court ordered restitution for expenses related to the victim's purchase of a new mobile home. The victim did not want to live in the mobile home where she had been raped and her son was threatened. (*Id.* at p. 497.) The Court of Appeal determined that the trial court did not abuse its discretion when imposing restitution, in part because "the trial court reasonably could have concluded that the increased costs incurred in the move was an 'economic loss' within the general language of the first sentence of section 1202.4, subdivision (f). [The victim] moved in order to prevent defendant from finding her again and reduce the fears engendered by the very mobilehome [*sic*] where she was sexually assaulted at knife point. The trial court could reasonably conclude that the enormous emotional trauma resulting from the attack was such that [the victim] virtually had to move and this was an 'economic loss' resulting from defendant's conduct without relying on the more specific language in section 1202.4, subdivision (f)(3)(I)." (*Id.* at p. 503.)

Thus, here, defense counsel could have reasonably relied on Doe's broad constitutional and statutory rights to restitution and the caselaw interpreting section 1202.4 in declining to object to the trial court's restitution order. For this reason as well, defendant has not demonstrated that there " ' "could be no satisfactory explanation" ' " for his counsel's nonobjection to the trial court's restitution order. (See *Lopez, supra*, 42 Cal.4th at p. 966.)

Second, defendant has not shown that he was prejudiced by his counsel's failure to object—i.e., that but for his counsel's failure to object to the restitution order, he would not have been ordered to pay restitution for the victim's relocation expenses. (See *Strickland, supra*, 466 U.S. at p. 694.) To do so, he would have to show a reasonable probability that the relocation expenses were not verifiable by law enforcement or a mental health provider, and he cannot do so on this record. Seven-year-old Doe was the victim of repeated sexual assaults in her home. The probation department's supplemental memorandum stated that the \$2,000 in moving costs were incurred "after [Doe's] family

moved as they did not want to be in the same home where the abuse occurred.” The memorandum also reflected that in addition to relocation costs, the victim had incurred costs for therapy and pain and suffering. The victim impact statement from Doe’s parents stated that for Doe, “[t]hinking about what happened to her is painful . . . and emotional.” Based on this record, defendant has not shown “a reasonable probability” that but for counsel’s failure to object, “the result of the proceeding would have been different.” (*Strickland, supra*, at p. 694.)

For all of these reasons, we conclude that defendant has not established that his counsel’s representation was constitutionally deficient.

IV. DISPOSITION

The judgment is affirmed.

BAMATTRE-MANOUKIAN, J.

WE CONCUR:

ELIA, ACTING P.J.

MIHARA, J.

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